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THE ISTHMIAN CANAL TREATY.

THE object of isthmiian canal negotiations between the United States and Great Britain, during the past few years, has been to facilitate the construction of an inter-oceanic waterway under the auspices of our own government, by the removal of obstacles arising from the Clayton-Bulwer treaty of 1850, without impairing the principle of neutralization established in that convention. It is worth considering whether the new treaty recently ratified by the Senate provides adequate means for the accomplishment of that end.

On February 5, 1900, the President submitted to the Senate for ratification the convention popularly known as the Hay-Pauncefote treaty.¹ By the terms of that compact our government was given the right to construct the canal under its own auspices, together with all the rights incidental to construction, as well as the exclusive right to regulate and manage the waterway. Elaborate preparations were made for the neutralization of the canal according to the provisions of the convention of Constantinople of October 29, 1888, providing for the neutralization of the Suez Canal. The waterway was to be free and open in time of war, as in time of peace, to the vessels of all nations, without discrimination. The canal was never to be blockaded, nor was any right of war to be exercised within its waters, or within three marine miles of its termini. The United States was, however, to be permitted to maintain a force of military police necessary to protect the canal against lawlessness and disorder. Precise regulations were also made with reference to the transit of vessels of war, prizes, and troops of a belligerent. The plant and all works incidental to the canal were to enjoy complete immunity from attack. Fortifications commanding the canal or adjacent waters were prohibited. Finally, it was agreed that the high contracting parties should bring the convention to the notice of the other powers and invite their adherence to it.

Much criticism was heaped upon the Hay-Pauncefote treaty when that instrument was submitted for ratification. The amendments made by the Senate indicate the general nature of the objections.

¹ See 14 HARV. L. REV. 52.

There were three amendments. The first was of slight importance and consisted merely of the insertion of the words "which convention is hereby superseded," following a reference to the Clayton-Bulwer treaty. The second declared that the preceding stipulations with reference to the neutralization of the canal should not "apply to measures which the United States may find necessary to take for securing by its own forces the defense of the United States and the maintenance of public order." The last struck out the agreement to invite other nations to adhere to the convention. In its altered form the treaty was unacceptable to Great Britain.

With this analysis of the treaty of 1900 in its original and amended form it is possible to examine the more intelligently the provisions of the new treaty signed by Mr. Hay and Lord Pauncefote November 18, 1901, and ratified December 16, 1901. The preamble is like that of the treaty of 1900. It is there stated that the purpose of the negotiators is to facilitate the construction of a canal under the auspices of our own government without impairing the general principle of neutralization. The first article comprises a frank statement that the Clayton-Bulwer treaty is superseded by the new convention. In the second article provision is made, in terms identical with those employed in the earlier treaty, for the construction of the waterway by the United States.

The third article, however, in its plan of neutralization differs somewhat from the corresponding article in the earlier treaty. It is here stated that the "United States adopts" as the basis of neutralization the rules embodied in the Constantinople convention. This is in contrast to the language of the original Hay-Pauncefote treaty in which it was declared that "the high contracting parties adopt" the rules. This change, however, is merely verbal; it does not alter the original plan. Great Britain as well as the United States by assenting to the treaty may be said to adopt the scheme of neutralization.

A conspicuous change in the new treaty is the omission of the sentence, "No fortifications shall be erected commanding the canal or the waters adjacent." This is the only prohibition contained in the earlier treaty which is not embodied in the new. The treaty of 1900 contained the provision that the waterway should be "free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations, on terms of entire equality." In the new treaty the words "in time of war as in time of peace" are omitted, and it is further provided that the canal shall be open to the vessels of "all nations observing these rules."

The new treaty is free from the provision attached to the earlier convention of 1900 on the recommendation of the Senate Committee on Foreign Relations, by which the United States was not to be prevented by the several prohibitions from taking such measures as it might find necessary "for securing by its own forces the defense of the United States and the maintenance of public order."

Article four of the new treaty was not contained in the convention of 1900 in its original or amended form. It is here provided "that no change of territorial sovereignty or of international relations of the country or countries traversed by the before mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty."

Having thus indicated the provisions of the treaty of 1901 in contrast with the terms of the original and amended conventions of 1900 it is possible to examine the obligations which the United States has now placed upon itself. These obligations naturally divide themselves into two classes. They are those of our government, first, with respect to Great Britain, and secondly, towards other powers. Under the first class the question arises whether the United States if at war with England would have the right to fortify the Isthmus, and by committing warlike acts in or near the canal prevent the transit of British warships. It has been noted that the treaty of 1901 contains no express prohibition of the right to fortify the Isthmus. This omission, however, seems to be of little moment. It could not be seriously maintained that our government secured the right to fortify as incidental to the right to "maintain such military police along the canal as may be necessary to perfect it against lawlessness and disorder." A police force may at times resort to temporary barricades, but it never depends upon permanent works. Its function is not to engage a foreign enemy but to check local disturbances. Its adversaries are for the most part individual offenders. A fortress is an instrument of war. It best serves its purpose when pouring shot upon an approaching enemy. In the event of war between the United States and Great Britain the erection of a fortress in the Isthmus by our government would be a step towards war and an act repugnant to the general principle of neutralization. The several specific prohibitions of the exercise of rights of war in the canal are broad enough to include by implication a prohibition of the erection of fortifications. All such acts in the vicinity of the canal stand on the same footing. The mutual agreement of the high contracting parties

to abstain therefrom signifies that our government has placed upon itself the obligation never to commit an act of war against Great Britain in or near the waterway. Both nations, by the recent treaty, have dedicated the canal as a spot to be forever remote from scenes of Anglo-American conflicts should any unhappily occur. For that reason our government could not rightfully attempt to thwart by force of arms the transit of British warships though bent on errands hostile to the United States. Our obligation not to do so would be a real one because resting upon the agreement willingly entered into. The existence of that obligation would not be jeopardized by the possible absence of a strong arm capable of enforcing it.

The obligations of the United States with respect to nations other than Great Britain are based on somewhat different grounds. These should be examined with reference, first, to states not consenting to the rules set forth in the treaty and indifferent to the plan of neutralization; and secondly, to states approving the plan and willing to respect the prohibitions contained in it. The question, therefore, first arises whether our government on account of the second Hay-Pauncefote treaty has imposed upon itself an obligation not to commit acts of war in the isthmian waters against a state not consenting to the neutralization rules; and consequently, whether the United States can rightfully seek to prevent by force of arms the transit of the ships of such a power through the waterway. The intention of the negotiators of the treaty was to provide a feasible plan for the neutralization of the contemplated canal. A neutralized interoceanic waterway is one which owes its peculiar status, that is, its isolation from scenes of war, to the consent of the several nations interested in the project, rather than to the determination and power of any single state, or the agreement and strength of two states. It is obvious that without its own consent the right of a nation to exercise acts of war in a certain locality cannot be completely forfeited. Would it, therefore, be reasonable to conclude that our government, by its agreement with England, has abrogated the right to commit acts of war in a certain locality against a nation still possessing that right? Would the several prohibitions of hostile acts embodied in the treaty in any sense estop the United States from asserting the right to disregard them in its dealings with such a nation? It is impossible to answer these questions affirmatively. It is difficult to discover on what ground a state not consenting to the plan of neutralization could object to acts on the part of our government

inconsistent with that plan. Nor is it evident on what theory England herself could object to such acts by our government. The Hay-Pauncefote treaty is but the first step taken by the signatory powers to affix to the waterway a peculiar status which could only become permanent and secure by the consent of the other powers. The express prohibitions of warlike acts merely indicate the object in view and the precise nature of the status sought to be ultimately attached to the canal. They do not in any way measure the rights and obligations of the United States with respect to non-signatory and non-consenting states. They are not declarations to the civilized nations of the world that the United States and Great Britain have forever relinquished their rights to attack their enemies in isthmian waters under all circumstances. The treaty itself is evidence of the intention of the high contracting parties on this point. According to the terms of section one of article three "the canal shall be free and open to the vessels of commerce and of war of all nations observing these rules." The "observing of these rules" concerning neutralization is the condition upon which the other powers are given the enjoyment of the right of transit. If only such are to enjoy that right it follows that the high contracting parties reserve the right to prevent as they may see fit, and by force of arms when necessity so demands, any non-consenting states from sending their vessels through the canal. How far the United States would deem it wise to exercise that right the exigencies of the hour could alone determine.

The insertion of this condition was peculiarly fortunate and vitally important in view of the omission of the article contained in the first treaty providing for the invitation of the other powers to accede to the plan of neutralization. The question at once arises as to the obligation of our government toward a nation other than England observing the rules of neutralization and acquiescing in the plan set forth in the treaty. By the terms of the Hay-Pauncefote treaty the United States and Great Britain expressed the desire to dedicate the contemplated waterway as a neutralized canal for the benefit of all maritime states evincing a like desire. Both nations declared their willingness to abrogate all rights to commit acts of hostility in those waters at all times as against all states willing to do likewise. The treaty, therefore, instead of emphasizing a warning to such powers as might be indifferent to the scheme of neutralization, was an invitation to the civilized world to share the benefits of the interoceanic high-

way by making a common sacrifice. Thus the United States and Great Britain made an offer, the terms of which are not uncertain. Whether or not these nations shall be bound by the obligations which they are ready to impose upon themselves, depends upon the acts of other states. If the offer is accepted, the high contracting parties will be bound, and the Hay-Pauncefote treaty will embody the mutual rights and obligations not merely of Great Britain and the United States, but of the Anglo-Saxon race and the powers of the world. It will be our duty not to oppose the passage through the Isthmus of the war vessels of a belligerent consenting to the rules and at war with the United States. While the treaty does not contain the statement that the canal shall be open in time of war as in time of peace, provision is nevertheless made for the transit of ships of a belligerent. Furthermore the right of transit is given to vessels of war "of all nations on terms of entire equality." Any nation, therefore, observing the rules and consenting to the plan of neutralization would be entitled to share the benefits as well as the burdens attaching to the right of transit. Should Germany acquiesce in the plan proposed and subsequently make war against the United States, neither nation would have the right to commit hostile acts in or near the canal. Our obligation to refrain from attempting to prevent the transit of the Kaiser's warships would be identical with our obligation toward the vessels of King Edward's navy in the event of a similar catastrophe.

The question arises as to what would constitute an acceptance of the offer thus extended by the United States and Great Britain? A treaty negotiated between England and some other power in which the latter acceded to the plan of neutralization would be an acceptance of the Anglo-American offer. A declaration by a friendly state, in response to an inquiry from the British Foreign Office or elicited by a note from the Department of State, and indicating a candid desire to acquiesce in the terms of the Hay-Pauncefote treaty would signify unqualified acceptance. The transit of vessels of war of another nation might be taken to indicate its approval of the rules and of its consent to observe them. Such enjoyment of the benefits conferred by the terms of the treaty and not secured by the law of nations would imply an acknowledgment of the obligation to observe the duties imposed by that convention. The passage through the canal, however, of the vessels of commerce of a friendly state would not mean as much. The law of nations gives to every maritime power the right to send

its vessels of commerce through such a canal. "If the navigation of the two seas thus connected is free," says a learned writer, "the navigation of the channel by which they are connected ought also to be free."¹ It is not the purpose of the writer to attempt to specify all the methods which might be employed by the several nations to accept the offer contained in the treaty. It is submitted, however, that the terms proposed by our government and Great Britain may be taken advantage of by other states without negotiating treaties with the United States for that purpose. The nature of our contract with England is such that by that agreement both countries hold out to all other maritime states, interested in the isthmian project, the opportunity to become sharers in the scheme of neutralization by means of any candid manifestation of coöperation. If the other powers as well as the United States and Great Britain should adhere to the plan proposed, the status of neutralization would be securely attached to the interoceanic canal. Its condition would be like that of the Suez Canal, which is thus described by the late Senator Davis in a report as Chairman of the Senate Committee on Foreign Relations: "None of the European powers would have it otherwise, because it is to the interest of all nations that war shall not exist in or near the canal, and it is a national crime for any nation to violate the neutral ground. No nation is willing to incur universal hostility by violating the sanctity of waters in which all have equal rights."²

In conclusion it may be said that the United States by ratifying the Hay-Pauncefote treaty has placed itself under an obligation not to commit hostile acts against Great Britain in or near the canal; that our government offers to place itself under a like obligation to all other states consenting to the plan of neutralization; and that finally, it has imposed upon itself no restraint to commit such acts in that locality against states not acceding to that plan.

To summarize briefly the scope of the new treaty is to say that it provides for the substantial fulfilment of the objects expressed in the preamble. The Clayton-Bulwer treaty is superseded; our government secures the right to construct the canal and to protect it from injury; and a simple plan of neutralization

¹ Wheaton's *Elements of International Law*, edited by R. H. Dana, Jr., 8th ed., § 181. See also Woolsey's *Introduction to the Study of International Law*, 4th ed., § 57.

² VIII. Reports of the Committee on Foreign Relations, United States Senate, 1789-1901, p. 668.

is agreed upon which is free from inconsistent provisions and capable of being made effective by the conduct and acquiescence of other nations coöperating with the sincere and friendly efforts of the United States and Great Britain.

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